Supreme Court, U.S.
FILED

No. 04 744 DEC 1 2004

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In The Supreme Court of the United States

ANGEL J. MIYARES,

Petitioner,

v.

FORSYTH COUNTY and
C. TIMOTHY MONROE, M.D.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Should the Court enforce its decision in *University of Tennessee v. Elliott*, 478 U.S. 788, 796 (1986), that unreviewed state administrative proceedings do not have preclusive effect on Title VII claims, to reverse the state appellate decision in this case, that petitioner's Title VII lawsuit was barred by principles of collateral estoppel even though there had been no judicial review of a state administrative determination that petitioner had not been discriminated against?

PARTIES

The parties to this proceeding are petitioner Angel J. Miyares, and respondents Forsyth County and C. Timothy Monroe, M.D.

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No. 04-
UNITED STATES SUPREME COURT
October Term 2004

ANGEL J. MIYARES,	)
Petitioner,	)
	)
v.	)
	)
FORSYTH COUNTY AND	)
C. TIMOTHY MONROE, M.D.,	)
Respondents.	)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner Angel J. Miyares respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the North Carolina Court of Appeals in *Angel J. Miyares v. Forsyth County and C. Timothy Monroe, M.D.*, no. COA 03-1278 (July 20, 2004), to which the Supreme Court of North Carolina denied discretionary review (October 8, 2004).

OPINION BELOW

The decision of the North Carolina Court of Appeals will be reported at ___ N.C.App. ___, ___ S.E.2d ___ (2004), and is reprinted at p. 3a. of the Appendix. The order of the Supreme Court of North Carolina denying discretionary review will be reported at ___ N.C. ___, ___ S.E.2d ___ (2004), and is reprinted at p. 1a of the Appendix.

JURISDICTION

The judgment of the order denying discretionary review by the Supreme Court of North Carolina was entered on October 8, 2004. This petition is filed within the time permitted by Rule 13.1R of the Rules of the Supreme Court. Jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the United States Constitution provides:

> The Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title VII, 42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer–
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

> any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

Title VII, 42 U.S.C. § 2000e-5(f)(3) provides:

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. . . .

STATEMENT OF THE CASE

Petitioner as plaintiff filed his action against respondents as defendants in the Superior Court of Forsyth County, North Carolina, seeking to recover damages for discrimination on the bases of national origin, handicapping condition, and age. In his complaint, petitioner specifically invoked Title VII of the Civil Rights Act of 1964, as well as the Americans With Disabilities Act, and the Age Discrimination in Employment Act of 1967.

Petitioner was formerly Director of Administrative Services of the Forsyth County, North Carolina, Health Department. Respondent C. Timothy Monroe, M.D., Director of the Forsyth County Health Department, notified petitioner on November 7, 2001, of his impending dismissal on December 7 of that year. Petitioner had an excellent performance record during his 20 years of employment by respondent Forsyth

County, with a number of "excellent" and "outstanding" annual performance evaluations and many commendations for his excellent work. Petitioner is a native of Cuba. Petitioner was always able to communicate effectively with his superiors and subordinates alike.

Respondent Monroe became the health director on June 1, 2001. Soon after his arrival, Dr. Monroe took a number of actions indicating that he bore discriminatory animus against petitioner. He falsely stated that petitioner's English was not comprehensible, that his pronunciation was terrible, that other people could not understand a word he said, that he had to repeat himself to petitioner many times, that other employees did not like petitioner, that petitioner was incompetent, and that petitioner had caused everything that was wrong with the health department.

Technically, according to respondents, petitioner's position was abolished. However, respondents advertised for a new employee to fill a newly-created position, that included most of petitioner's duties, and soon after petitioner's dismissal, a new employee of non-Hispanic origin was hired for the job.

Promptly after his dismissal, petitioner filed a charge of discrimination with the United States Equal Employment Opportunity Commission, claiming discrimination on the basis of national origin, disability, and age. Petitioner received his "right to sue" letter from the Equal Employment Opportunity Commission on April 18, 2002.

At about the same time that he filed a charge with the Equal Employment Opportunity Commission, petitioner filed a contested case petition with the Office of Administrative Hearings of the State of North Carolina in which he alleged termination without just cause, retaliation for opposing alleged discrimination by filing a grievance against respondent Monroe, and discrimination based on his Cuban origin, handicapping hearing impairment, and age.

An administrative law judge of the Office of Administrative Hearings conducted an evidentiary hearing on petitioner's petition. On August 5, 2002, the administrative law judge issued a decision and recommended decision. The administrative law judge found that petitioner had not been terminated without just cause, that he had not been discriminated against, and that he had not been retaliated against on account of filing his grievance.

The administrative law judge's decision was in the form of a recommendation to the State Personnel Commission. On December 12, 2002, the State Personnel Commission heard oral argument, and on January 6, 2003, it issued its decision, in the form of a recommendation to the Local Appointing Authority, in

which it adopted all of the administrative law judge's findings of fact and conclusions of law, except conclusions of law to the effect that petitioner was entitled to recover severance pay. Respondent Monroe in his capacity of Forsyth County health director undertook to act as the Local Appointing Authority, and without according petitioner any right of briefing, hearing, or argument, essentially adopted the State Personnel Commission's recommendations on April 4, 2003.

Petitioner filed a petition for judicial review of administrative decision in the Forsyth County Superior Court on April 28, 2003, challenging respondent Monroe's decision. The case came on for hearing before the Forsyth County Superior Court. The court did not deal with petitioner's detailed exceptions to the decisions of the Local Appointing Authority. Rather, the court entered an order on November 17, 2003, holding (1) Dr. Monroe could have not been considered an impartial decisionmaker, and, therefore, it was improper for him to have acted in an adjudicative capacity by issuing the final agency decision, and (2) petitioner is entitled to receive severance pay from Forsyth County on account of the abolition of his position of employment, amounting to a reduction in force.

On December 15, 2003, respondents appealed to the North Carolina Court of Appeals from the judgment of the Superior Court of Forsyth County. This appeal remains pending before the Court of Appeals.

In the present civil action seeking to recover damages for discrimination, respondents filed motion for summary judgment and dismissal based on the doctrines of collateral estoppel and exhaustion of administrative remedies. These motions were heard by the Superior Court of Forsyth County and denied in an order entered on June 6, 2003.

The North Carolina Court of Appeals filed its opinion reversing the Superior Court of Forsyth County on July 20, 2004. Thereafter, petitioner filed a timely petition for rehearing with the North Carolina Court of Appeals. That petition was denied on August 26, 2004. Petitioner filed his petition for discretionary review with the Supreme Court of North Carolina, and that petition was denied on October 8, 2004.

REASON FOR GRANTING THE WRIT

The North Carolina appellate court decided an important federal question in a way that plainly conflicted with this Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788, 796 (1986), that unreviewed state administrative proceedings do not have preclusive effect on Title VII claims, when the state courts in this case applied principles of collateral estoppel to hold that the adverse state administrative determinations were final and binding, thereby requiring the dismissal of petitioner's Title VII lawsuit.

The North Carolina Court of Appeals held that petitioner's lawsuit is barred by the principles of collateral estoppel even though there had been no judicial review of the administrative determination that

petitioner had not been discriminated against. The Court of Appeals chose to regard the adverse unreviewed administrative determination as final and binding. (App. 3a.) The Supreme Court of North Carolina denied petitioner's petition for discretionary review of the Court of Appeals' decision. (App. 1a.)

This decision by the North Carolina Court of Appeals is in direct conflict with a controlling decision by this Court, *University of Tennessee v. Elliott*, 478 U.S. 788, 796 (1986). In that case, the Court unanimously held that the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., required that collateral estoppel not be applied to dismiss civil actions brought after unsuccessful state administrative proceedings raising the same issues of discrimination. The Court said, "[W]e conclude that . . . Congress did not intend unreviewed state administrative decision proceedings to have preclusive effect on Title VII claims." 478 U.S. at 796. Procedurally, that case was identical to the present case. An administrative law judge had determined that the dismissal of an employee of the University of Tennessee was not motivated by racial prejudice, and then the employee filed suit in civil court alleging racially discriminatory discharge in violation of Title VII. 478 U.S. at 790-91.

Under the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, it is well established that the state courts have the obligation to yield to this Court concerning the above interpretation of Title VII. In *Sola Electric Company v. Jefferson Electric Company*, 317 U.S. 173 (1942), this Court held that state rules of estoppel cannot be invoked to interfere with

enforcement of federal statutes in a manner inconsistent with decisions by this Court. The opinion in that case stated, "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers of which are to be derived from the statute and federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield." 317 U.S. at 176.

Therefore, the North Carolina state appellate courts "decided an important federal question in a way that conflicts with relevant decisions of this Court", Rule 10(c), Rules of the Supreme Court, and certiorari should be granted to require conformity to decisions of this Court.

The North Carolina Supreme Court and the Supreme Court of North Carolina could not have been inadvertent to the authority of *University of Tennessee v. Elliott*, supra, and *Sola Electric Company v. Jefferson Electric Company*, supra, since these cases were specifically brought to the attention of those courts in the petition for rehearing in the North Carolina Court of Appeals and the petition for discretionary review in the Supreme Court of North Carolina.

CONCLUSION

For the above reasons, a writ of certiorari should issue to the Supreme Court of North Carolina to review the judgment and opinion of the North Carolina Court of Appeals.

Respectfully submitted,

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No. 478P04 TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

* *

(Miyares v Forsyth County, et al)

ANGEL J. MIYARES

v

FORSYTH COUNTY and C. TIMOTHY MONROE, M.D.

From NC Court of Appeals
(COA03-1278)
From Forsyth
(02CVS4895)

* *

[ENTERED: OCTOBER 8, 2004]

ORDER

Upon consideration of the petition filed on the 9th day of September 2004 by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 6th day of October 2004.

s/ Brady, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of October 2004.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

/s/ Shaula A. Brannan
Shaula A. Brannan
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. Norman B. Smith, Attorney at Law, For Miyares
Mr. James R. Morgan, Attorney at Law, For Forsyth County & Monroe (by E-Mail)
West Publishing Company (By E-Mail)
Lexis_Nexis (By E-Mail)
LOIS Law (By E-Mail)

NO. COA03-1278

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2004

ANGEL J. MIYARES,
Plaintiff-appellee

v. Forsyth County
No. 02 CVS 4895

FORSYTH COUNTY, and C. TIMOTHY MONROE, M.D.
Defendant-appellants

[ENTERED: JULY 20, 2004]

Appeal by defendants from order entered 3 June 2003 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 15 June 2004.

Smith, James, Rowlett & Cohen, L.L.P., by Norman B. Smith, for plaintiff.

Womble Carlyle Sandridge & Rice, P.L.L.C., by James R. Morgan, Jr., for defendants.

LEVINSON, Judge.

Defendants appeal from the trial court's denial of their motions for summary judgment and for dismissal. We reverse.

Plaintiff (Angel Miyares) worked for the Forsyth County Health Department from 1986 to 2001. Miyares is originally from Cuba, and speaks English with a Spanish accent. In 2001, at the time of the events giving rise to this suit, he was 62 years old and had a hearing impairment. In June 2001, defendant Dr. Timothy Monroe began employment as the director of the Forsyth County Health Department. Monroe conflicted with Miyares over various work- related issues, and on 30 October 2001 Miyares filed a grievanceagainst Monroe with the Forsyth County Board of Health. Miyares alleged that Monroe harassed him and discriminated against him on the basis of his national origin, age, and disability (hearing loss). A week after filing the grievance, Miyares was informed that his position was being eliminated and that he was dismissed due to this reduction in force.

On 28 December 2001 Miyares filed a petition with the Office of Administrative Hearings seeking a contested case hearing. The petition alleged that his termination was the result of discrimination based on his national origin, age, and disability (hearing loss). In April 2002 a hearing was held before an administrative law judge (ALJ), who heard testimony from sixteen witnesses and received over forty exhibits. In August 2002 the ALJ issued his decision and recommendation to the State Personnel Commission (SPC). The decision contained findings of fact and conclusions of law detailed in over fifteen pages. The ALJ concluded that Miyares had failed to meet the burden of proof regarding any of his claims of discrimination, and recommended that the SPC adopt his findings and conclusions. Following a review of the record, the SPC

on 6 January 2003 issued its decision agreeing with the ALJ and advising the Forsyth County Health Department to adopt the decision of the ALJ. On 4 April 2003 a final agency decision was issued by Monroe on behalf of the Forsyth County Health Department. Miyares appealed for judicial review in superior court, in part upon the basis that Monroe could not be an impartial decision maker.

Meanwhile, on 20 November 2001, before Miyares filed a request for a contested case hearing, he had filed a charge with the Equal Employment Opportunity Commission (EEOC), which also alleged discrimination based on his national origin, age, and disability. On 18 April 2002, shortly before the contested case hearing, the EEOC issued Miyares a "right to sue" letter. In July 2002, while the decision of the Forsyth County Health Department was on appeal to superior court, Miyares filed a civil suit against defendants alleging discrimination on the basis of age, national origin, and disability in violation of Title VII of the 1964 Civil Rights Act. On 12 May 2003 defendants moved for summary judgment on the grounds that the Forsyth County Health Department had issued a final agency decision on the same issues raised in Miyares' civil suit, and that his suit was barred by principles of collateral estoppel. Defendants also filed a motion for dismissal based on lack of jurisdiction, on the grounds that Miyares had failed to exhaust his administrative remedies. On 3 June 2003 Superior Court Judge Ron Spivey issued an order denying defendants' motions, from which defendants appealed.

The record on appeal was filed with this Court in September 2003. On 6 February 2004 defendants' motion to supplement the record was granted. Accordingly, the record was supplemented to include documents showing the following: On 14 November 2003 Superior Court Judge L. Todd Burke ruled on plaintiff Miyares' appeal from the decision of the Forsyth County Health Department. The court held in favor of plaintiff on the issue of whether Monroewas an appropriately impartial decision maker in this case, and ordered the matter remanded to the Forsyth County Board of Health for entry of a final agency decision. On 21 January 2004 the Board of Health issued its decision. The Board of Health adopted the recommendation of the SPC, incorporating by reference its findings and conclusions.

On 11 February 2004 plaintiff also moved to supplement the record, in order to establish that defendants had appealed from Judge Burke's decision before voluntarily complying with the order. Defendants responded on 23 February 2004 with a brief in opposition to plaintiff's motion to supplement the record. Defendants argued that case law establishes that appeal of an order neither vacates an order, nor prohibits a party from voluntarily complying with the order. On 24 February 2004 plaintiffs' motion was denied, and thus his proffered documents were not made a part of the record.

We first address plaintiff's argument that this appeal should be dismissed as interlocutory. Defendants moved for summary judgment on the grounds that plaintiff was barred by the doctrine of collateral estoppel from bringing a civil suit against defendants. This Court has held "that the denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right, and that defendants' appeal, although interlocutory, is properly before us." *McCallum v. North Carolina Coop. Extension Serv.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231,*appeal dismissed, disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001). We conclude that defendants' appeal is properly before us.

We further conclude that plaintiff's suit is barred by principles of collateral estoppel. The doctrine of collateral estoppel "'is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally.'" *Scarvey v. First Federal Savings and Loan Ass'n of Charlotte*, 146 N.C. App. 33, 38-39, 552 S.E.2d 655, 659 (2001) (quoting *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973)).

> In order for collateral estoppel to be applicable, certain requirements must be met. The elements of collateral estoppel, as stated by our Supreme Court, are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined.

McDonald v. Skeen, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211, *disc. review denied*, 356 N.C. 437, 571 S.E.2d 221-22 (2002) (citation omitted).

Moreover, "collateral estoppel can serve as the basis for summary judgment." *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 166, 557 S.E.2d 610, 613 (2001), *aff'd mem.*, 355 N.C. 485, 562 S.E.2d 422 (2002) (citation and internal quotation marks omitted). "Collateral estoppel precludes relitigation of an issue decided previously in judicial or administrative proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in anearlier proceeding." *Id.* (emphasis added) (citation and internal quotation marks omitted).

In the instant case, plaintiff filed for a contested case hearing, alleging discrimination based on his national origin, age, and disability. A full hearing was held before an ALJ at which plaintiff presented witness testimony and

documentary evidence. The ALJ's determination, that plaintiff had failed to meet his burden of proof to show by a preponderance of the evidence that he was the victim of discrimination, was confirmed by the SPC and by the Forsyth County Board of Health, which issued a final agency decision agreeing with the ALJ and adopting his findings of fact and conclusions of law. Plaintiff's civil suit was brought against the same parties - the Forsyth County Health Department and Dr. Monroe - and raises the same allegations of discrimination based on his national origin, age, and disability. Plaintiff does not argue that the claims and parties are different, or that new issues are presented. Nor does he dispute that these issues were actually litigated before the ALJ, and were essential to its decision. Plaintiff instead argues that, because he has appealed the agency decision, it is not a final judgment and may not be given collateral estoppel effect. We disagree.

"'When a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed.'" *State v. Summers*, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (quoting *King*,284 N.C. at 355, 200 S.E.2d at 805). Plaintiff cites no authority for the proposition that collateral estoppel is inapplicable to a judgment during the pendency of an appeal, and we find none.

For the reasons discussed above, we conclude that the trial court erred by denying defendants' motion for summary judgment. As we have concluded that summary judgment is proper on the basis of collateral estoppel, we do not need to address defendants' other argument concerning failure to exhaust administrative remedies. Accordingly, the trial court's order denying defendants' motion for summary judgment is

Reversed.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).

Supreme Court, U.S.
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No. 04-744

IN THE

Supreme Court of the United States

ANGEL J. MIYARES,

Petitioner,

v.

FORSYTH COUNTY and C. TIMOTHY MONROE, M.D.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner was employed by the Forsyth County, North Carolina Department of Social Services from 1986 to 2001. In June 2001, respondent Dr. Timothy Monroe became the Forsyth County Health Director. Petitioner and Dr. Monroe clashed over various work-related issues. On November 7, 2001, petitioner was informed that his position was being eliminated effective December 7, 2001 in connection with a reduction in force.

After petitioner's termination, his legal claims proceeded on two different tracks. On the first track, petitioner filed a petition for a contested case hearing with the North Carolina Office of Administrative Hearings. In his petition, petitioner claimed he was terminated without just cause, in retaliation for filing a grievance against Dr. Monroe, and as a result of discrimination on the basis of his national origin, age, and disability. An administrative law judge ("ALJ") held a full evidentiary hearing that lasted four days and heard testimony from sixteen witnesses and received over forty exhibits. The ALJ issued a recommended decision to the North Carolina State Personnel Commission ("SPC") in which he concluded that plaintiff was terminated for just cause and that plaintiff had failed to prove his claims of discrimination and retaliation. The ALJ recommended that the SPC adopt his findings and conclusions. The SPC then issued a decision agreeing with the ALJ and recommending that the Forsyth County Health Department adopt the ALJ's decision. Dr. Timothy Monroe, as Health Director, issued the local appointing authority's final agency decision, adopted the ALJ's and SPC's recommendations, and found no discrimination in connection with plaintiff's termination. Petitioner appealed to state superior court for judicial review.

On judicial review of Dr. Monroe's final agency decision, the North Carolina state superior court held that Dr. Monroe was not an appropriate decision-maker and remanded the matter to the Forsyth County Board of Health for entry of a final agency decision. Respondents originally appealed this superior court decision to the North Carolina Court of Appeals. While that appeal was pending and before the North Carolina Court of Appeals made any ruling, the respondents voluntarily dismissed their appeal and complied with the state superior court's order. In conformity with the superior court's order, the Board of Health reviewed the matter as the local appointing authority and issued a final agency decision. The Board of Health adopted the SPC's recommendation and incorporated its findings and conclusions. Specifically, the Board of Health found petitioner's termination was not the result of discrimination. Although petitioner originally appealed the Board of Health's final agency decision to state superior court, petitioner has since voluntarily dismissed that appeal.

About the same time that petitioner filed his petition for a contested case hearing before the North Carolina Office of Administrative Hearings, he also filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that his termination was the result of national origin, disability, and age discrimination. Upon receiving the EEOC's no cause finding and notice of right to sue, petitioner filed this action in North Carolina state court, alleging claims of national origin, age, and disability discrimination under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA").

In the present action, the respondents moved for summary judgment arguing that the previous ALJ, SPC, and final agency decision finding no discrimination had collateral estoppel effect on petitioner's national origin, age, and disability discrimination claims in this case. Although the state trial court denied the respondents' motion, the respondents appealed. In an unpublished decision, the North Carolina Court of Appeals unanimously held that petitioner's claims in this action are barred by principles of collateral estoppel. *Miyares v. Forsyth County*, __ N.C. App. __, 600 S.E.2d 899, 2004 WL 1611494, *2 (unpublished), *disc. rev. denied*, 359 N.C. 69, 604 S.E.2d 668 (2004). Petitioner then petitioned the North Carolina Court of Appeals for a rehearing. In his petition for rehearing, petitioner argued that *University of Tennessee v. Elliot*, 478 U.S. 788, 106 S. Ct. 3220 (1986), controlled and prevented the application of collateral estoppel in this case. However, petitioner admitted that he was raising the *Elliot* case for the first time in his petition for rehearing. The North Carolina Court of Appeals denied the petition for rehearing. Petitioner then sought discretionary review by the North Carolina Supreme Court, but that petition was also denied. *Miyares*, 359 N.C. 69, 604 S.E.2d 668.

Petitioner now seeks a writ of certiorari from this Court.

REASONS FOR DENYING THE PETITION

In his petition for writ of certiorari, petitioner contends that the decision of the North Carolina Court of Appeals is in conflict with this Court's decision in *University of Tennessee v. Elliot*, 478 U.S. 788, 106 S. Ct. 3220 (1986). However, the present case is distinguishable from the *Elliot* decision petitioner cites. Therefore, the decision of the North Carolina Court of Appeals is not in conflict with *Elliot* and this Court should deny the petition for writ of certiorari.

In *Elliot*, a former employee of the University of Tennessee contended his termination was motivated by race discrimination. 478 U.S. at 790, 106 S. Ct. at 3222. When the employee requested a hearing to contest his termination, a state administrative law judge held a hearing and determined that the employee's discharge was not racially motivated. *Id.* at 791, 106 S. Ct. at 3222. The employee did not seek review of the administrative decision in state court. *Id.* at 792, 106 S. Ct. at 3222. While these administrative proceedings were pending, the employee in *Elliot* had filed a Title VII and 42 U.S.C. § 1983 action in federal court contending that the University had discriminated against him on the basis of his race.

The United States Supreme Court stated that the issue on appeal in *Elliot* was whether the administrative findings of the ALJ were "entitled to preclusive effect ***in federal court***, where respondent has raised discrimination claims under various civil rights laws, including Title VII of the Civil Rights Act of 1964 . . ." *Elliot*, 478 U.S. at 790, 106 S. Ct. at 3221-22 (emphasis added). The Court in *Elliot* concluded that "Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims" in

federal court. *Id.* at 796, 106 S. Ct. at 3225. In reaching this conclusion, the Court analyzed its previous decision in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S. Ct. 1883 (1982). The Court in *Kremer* determined that final state court judgments are entitled to full faith and credit, and therefore preclusive effect, in Title VII actions in federal court. Regarding unreviewed determinations by state agencies, the Court in *Kremer* stated:

> Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review ***even if such a decision were to be afforded preclusive effect in a State's own courts.***

Kremer, 456 U.S. at 470 n.7, 102 S. Ct. at 1891 n.7 (emphasis added) (*quoted with approval in Elliot*, 478 U.S. at 793, 106 S. Ct. at 3223).

This language from *Kremer*, which was quoted and relied upon in *Elliot*, indicates that an unreviewed state administrative determination may have preclusive effect in a state court discrimination case even though it would not have preclusive effect if the discrimination case were filed in federal court. Thus, the fact that petitioner in the present case filed his Title VII action in state court rather than federal court is a critical distinguishing factor which renders the *Elliot* decision inapplicable. If petitioner had wanted to ensure that the previous decisions of the ALJ, the SPC, Dr. Monroe, and the Board of Health did not have preclusive effect on his Title VII, ADA and ADEA claims, he was perfectly free to file them in federal court. He did not do so and should not now be heard to complain about his own choice of forum.

Elliot and *Kremer* indicate that an unreviewed state administrative determination may be afforded preclusive effect in discrimination cases filed in state courts. The North Carolina Court of Appeals did exactly that when it held that the final agency decision finding no discrimination against petitioner in connection with his termination had preclusive effect on petitioner's subsequent discrimination claims in his state court action. *Miyares*, 2004 WL 1611494. Moreover, the North Carolina Court of Appeals' decision in *Miyares* was in accordance with the North Carolina Supreme Court's decision in *Maines v. City of Greensboro*, 300 N.C. 126, 265 S.E.2d 155 (1980). The plaintiff in *Maines* was a Greensboro firefighter who was notified he was in violation of the department's residency requirement. Plaintiff attended a departmental hearing where he challenged the allegation that he was in violation of the residency requirement. The hearing officer determined that Maines was in violation and terminated Maines' employment. Maines appealed to the City Manager, who upheld the termination decision. Maines then filed a separate declaratory judgment action in state court contending he was unlawfully discharged. The North Carolina Supreme Court in *Maines* noted that plaintiff had not sought judicial review of the administrative determination that he was in violation of the residency requirement. *Id.* at 133, 265 S.E.2d at 160. Accordingly, the Court in *Maines* concluded, "The general rule is that an essential issue of fact which has been litigated and determined by an administrative decision is conclusive between the parties in a subsequent action. We are therefore bound by the determination that plaintiff moved outside the City limits of Greensboro." *Id.* (citations omitted).

Thus, the North Carolina Court of Appeals properly held that the unreviewed administrative decisions by the ALJ, SPC, and Forsyth County Board of Health that petitioner Miyares had not been discriminated against in his termination had collateral estoppel effect on his Title VII, ADA, and ADEA claims filed in state court. That decision was in accordance with the mandates of the North Carolina Supreme Court's decision in *Maines*. Furthermore, the decision of the Court of Appeals was not in conflict with this Court's decisions in *Elliot* and *Kremer* but was instead permitted by those decisions. Accordingly, this Court should not review the decision of the North Carolina Court of Appeals but instead should deny the petition for writ of certiorari as the decision of the North Carolina Court of Appeals was proper and appropriate under United States Supreme Court precedent.

CONCLUSION

Wherefore, the Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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